

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NABIL ENRIQUE SALMAN, STEFANO MICHELE
SINIGAGLIA, ROBERT PAUL CASSONI, PABLO IBARRA, and JOSE
MAURICIO BERRIZBEITIA

Appeal 2007-2249
Application 10/010,391
Technology Center 3700

Decided: November 14, 2007

Before TERRY J. OWENS, JENNIFER D. BAHR, and DAVID B.
WALKER, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Nabil Enrique Salman et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1, 2, 5-8, 11 (as amended subsequent to the Final Rejection), 13-16, and 18, which are all of the pending claims. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

THE INVENTION

Appellants' claimed invention is directed to "portable packaging devices useful with a length of non-resilient flexible tubular sheet material dispensed from the device for forming individual packaged articles from separated portions of the tubular sheet" (Spec. 1:16-18). Claim 1 is representative of the claimed subject matter and reads as follows:

1. An article packaging device comprising:
 - an inlet end,
 - an outlet end,
 - a body formed by an inner core having an inlet opening and an outlet opening, and a passageway therebetween,
 - a casing comprising a casing wall around the body, the casing joined to the body with a storage space between them, and
 - a tubular sheet within the storage space, the tubular sheet dispensable through a dispensing opening between the body and the casing and into the inlet opening of the inner core and wherein said tubular sheet comprises an adhesive on at least a portion of said tubular sheet, wherein the casing or the storage space comprises a slot, wherein said slot is adapted for compressively gathering said tubular sheet as the sheet is inserted and moved through said slot, whereby the compressive gathering of said tubular sheet causes said adhesive to bond said tubular sheet to itself along its gathered portions in order to close and seal a first packaged article and form a new gathered leading edge of a second packaged article.

THE REJECTION

Appellants seek review of the Examiner's rejection of claims 1, 2, 5-8, 11, 13-16, and 18 under 35 U.S.C. § 103(a) as being unpatentable over Richards (US 4,869,049, issued September 26, 1989) in view of Hamilton (US 5,662,758, issued September 2, 1997) and Meissner (US 3,111,796, issued November 26, 1963).¹

OPINION

Appellants argue that the combination of Richards, Hamilton, and Meissner fails to teach or suggest all of the limitations of Appellants' claims. In particular, Appellants argue that "Richards does not teach a slot that is adapted for compressively gathering said tubular sheet which causes a 'new gathered leading edge,' as recited, in part, in claims 1 and 11" (Br. 8) and neither Hamilton nor Meissner is relied upon by the Examiner to cure this deficiency (Br. 9). In fact, each of Appellants' independent claims 1, 11, and 15 recites

the casing or the storage space comprises a slot, wherein said slot is adapted for compressively gathering said tubular sheet as the sheet is inserted and moved through said slot, whereby the compressive gathering of said tubular sheet causes said adhesive to bond said tubular sheet to itself along its gathered portions in order to close and seal a first packaged article and form a new gathered leading edge.

Accordingly, Appellants' argument is directed to all of the claims on appeal.

¹ The rejections of claims 15 and 11 under 35 U.S.C. § 112, first paragraph and second paragraph, respectively, have been withdrawn by the Examiner (Advisory Action mailed December 28, 2004).

In addressing the slot feature, the Examiner contends “a means 61 comprises a slot for separating the closed packaged article” (Ans. 3). In response to Appellants’ argument, the Examiner states “Figure 6 of Richards clearly discloses that the slot [defined] between member part 62 and 63 is *adaptable* for compressibly gathering of the tubular sheet as the tubular sheet is inserted and moved through the slot” (Ans. 7; emphasis ours). The Examiner’s statement that the slot of Richards is “adaptable” does not address the claim limitation at issue, which requires the slot to be “*adapted* for compressively gathering . . . in order to close and seal a first packaged article and form a new gathered leading edge” (emphasis ours).

The feature of Richards to which the Examiner refers is cutter unit 61, which is incorporated in lid 31, a two-part unit comprising an outer ring 55 formed with a flange 50 that locks into the tip of the core 1, and a disc 56, which is freely rotatable in the ring 55 (col. 3, ll. 61-65). The cutter unit 61 is fixed beneath a horizontal flange 58 of an angle section ring in which disc 56 is set. Cutter unit 61 has an upper arcuate part 62 and a lower tapered shoe 63. The upper arcuate part 62 and lower tapered shoe 63 are separated by a gap; a metal cutter blade 64 is fixed close to the closed termination of the gap as close as possible to the relatively stationary flange 50. Richards, col. 3, l. 65 to col. 4, l. 10; fig. 6. Cutter unit 61 is operated by turning disc 56 a full revolution so that the tapered shoe 63 pierces through the radially pleated taut portion 65 (fig. 1) of flexible tubing 2 that flares outward from the topmost twist 30 to the core 1, with further rotation of the disc 56 causing the cutter blade 64 to cut round the tubing material, cleanly separating the uppermost package from the flexible tubing remaining on the core 1 (col. 4, ll. 14-22).

The Examiner has not explained, nor is it apparent, how the gap formed between upper arcuate part 62 and lower tapered shoe 63 is adapted for compressively gathering the tubular sheet to close and seal the first packaged article to form a new gathered leading edge, as called for in claims 1, 11, and 15. With its positioning as described by Richards within the lid 31 of the Richards device, the cutter unit 61 severs the flexible tubing 2 above or outside of the gathered, sealed region (at twist 30) and does not appear capable of compressively gathering the tubular sheet (flexible tubing 2) to close and seal a packaged article and to form a new gathered leading edge, as claimed. Further, while Richards broadly teaches the cutter unit can be provided beneath the pack location (col. 5, ll. 2-4), that is, beneath the core 1 in the bin portion 36 of the device, it is not apparent how such relocation would necessarily yield a slot adapted as called for in independent claims 1, 11, and 15. Further, the Examiner does not rely on Hamilton or Meissner for any teaching that would remedy the above-noted deficiency of Richards.

In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). *See also In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). It is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d, 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), viz., (1) the scope and content of the prior art; (2) the differences between the prior art and the

claims at issue; and (3) the level of ordinary skill in the art. In addition to these factual determinations, the examiner must also provide “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) (*cited with approval in KSR Int’l. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007)). Only if this initial burden is met does the burden of coming forward with evidence or argument shift to the appellant. *See Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444. *See also Piasecki*, 745 F.2d at 1472, 223 USPQ at 788. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *See Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444; *Piasecki*, 745 F.2d at 1472, 223 USPQ at 788.

In light of the above, we conclude the Examiner has not discharged the initial burden of establishing a prima facie case that the subject matter of claims 1, 11, and 15, and claims 2, 5-8, 13, 14, 16, and 18 depending therefrom, would have been obvious to a person of ordinary skill in the art at the time of Appellants’ invention. Accordingly, the rejection cannot be sustained.

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SUMMARY

The decision of the Examiner to reject claims 1, 2, 5-8, 11, 13-16, and 18 is reversed.

REVERSED

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